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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

NO. 16-0049

LAWRENCE G. SKOTNIK, APPELLANT,

V.

ROBERT A. MCDONALD,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before PIETSCH, *Judge*.

MEMORANDUM DECISION

Note: Pursuant to U.S. Vet. App. R. 30(a), this action may not be cited as precedent.

PIETSCH, *Judge*: Lawrence G. Skotnik appeals through counsel a November 24, 2015, Board of Veterans' Appeals (Board) decision that denied entitlement to VA benefits for chronic pulmonary obstructive disease (COPD).[1] This appeal is timely and the Court has jurisdiction to review the Board's decision pursuant to 38 U.S.C. §§ 7252(a) and 7266(a). Single-judge disposition is appropriate as the issue is of "relative simplicity" and "the outcome is not reasonably debatable." *Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990). For the reasons that follow, the Court will affirm the Board's November 24, 2015, decision.

I. FACTS

Mr. Skotnik served on active duty in the U.S. Army from June 1965 to June 1967, including service in Vietnam.

In May 2008, Mr. Skotnik began receiving treatment for COPD and early obstructive changes. He subsequently filed a claim for VA benefits for COPD in December 2008. In a March 2009 statement, he asserted that his COPD resulted from exposure to herbicides in Vietnam.

[1]The Board remanded the issue of entitlement to benefits for arthritis, and that claim is not before the Court. *See Hampton v. Gober*, 10 Vet.App. 481, 483 (1997) (claims remanded by the Board cannot be reviewed by the Court).

In July 2009, a VA regional office (RO) denied Mr. Skotnik's claim for benefits for COPD. He disagreed with that decision, later asserting that his medical problems, including COPD, could be linked to his Agent Orange exposure during service. In October 2013, when appealing the denial of his claim, Mr. Skotnik referred to an article that he had read regarding Vietnam veterans' herbicide exposure, stating that the exposure may result in diseases that attack the internal organs, but do not appear until a decade or more after the herbicide exposure.

In November 2015, the Board issued the decision currently on appeal denying benefits for COPD. The Board found that a medical examination was not warranted because the record does not contain competent evidence suggesting a link between Mr. Skotnik's COPD and herbicide exposure during service. The Board noted that Mr. Skotnik provided only his lay opinions in support of his claim and failed to cite to supporting medical opinions or treatise evidence.

On appeal, Mr. Skotnik argues that the Board erred by finding that he was not entitled to a medical examination for his COPD. Specifically, he argues that he referenced an article that he had read, which linked his condition to herbicide exposure during service. He states that this reference was sufficient to show that his condition may be associated with his service and, thus, the Board should have found that he was entitled to a VA examination before denying his claim.

The Secretary responds that the Board did not err in finding that Mr. Skotnik was not entitled to a VA examination. The Secretary acknowledges that he referred to a medical article during the course of his appeal, but states that he never submitted the article or provided a citation to the Board. The Secretary states that Mr. Skotnik's recollections of an article were not sufficient to trigger VA's duty to provide a medical examination.

II. ANALYSIS

The Secretary has a duty to assist veterans in developing their claims. 38 U.S.C. § 5103A. The duty to assist includes providing a veteran with a medical examination or opinion when there is (1) competent evidence of a current disability or persistent or recurrent symptoms of a disability; (2) evidence establishing that an event, injury, or disease occurred in service or establishing certain diseases manifesting during an applicable presumptive period for which the veteran qualifies; (3) an indication that the disability or persistent or recurrent symptoms of a

disability may be associated with the veteran's service or with another service-connected disability; and (4) insufficient competent evidence on file for the Secretary to make a decision on the claim. *McLendon v. Nicholson*, 20 Vet.App. 79, 81 (2006); *see* 38 U.S.C. § 5103A(d)(2); 38 C.F.R. § 3.159(c)(4)(i) (2016).

In *McLendon*, the Court observed that the third prong of § 3.159(c)(4)(i)(C), requiring that the evidence of record "[i]ndicate[]["] that "the claimed disability or symptoms may be associated with the established event," establishes "a low threshold" for determining when the Secretary is required to furnish a medical examination. 20 Vet.App. at 83. The Court went on to note that "[t]he types of evidence that 'indicate' that a current disability 'may be associated' with military service include, but are not limited to, medical evidence that suggests a nexus but is too equivocal or lacking in specificity to support a decision on the merits, or credible evidence of continuity of symptomatology such as pain or other symptoms capable of lay observation." *Id.*

The Court reviews the Board's finding regarding the third prong, as well as its ultimate conclusion as to whether a VA medical examination or opinion was necessary, under the "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law" standard set forth in 38 U.S.C. § 7261(a)(3)(A). *McLendon*, 20 Vet.App. at 81, 83. Under this standard, the Court must affirm as long as the Board "articulate[d] a satisfactory explanation for its decision" and there is "'a rational connection between the facts found and the choice made.'" *Sorakubo v. Principi*, 16 Vet.App. 120, 123 (2002) (*quoting Jordan v. Brown*, 10 Vet.App. 171, 175 (1997)). In addition, the Board is required to provide a written statement of the reasons or bases for its findings and conclusions on all material issues of fact and law presented on the record; the statement must be adequate to enable a claimant to understand the precise basis for the Board's decision, as well as to facilitate review in this Court. 38 U.S.C. § 7104(d)(1); *Allday v. Brown*, 7 Vet.App. 517, 527 (1995); *Simon v. Derwinski*, 2 Vet.App. 621, 622 (1992); *Gilbert v. Derwinski*, 1 Vet.App. 49, 57 (1990). To comply with this requirement, the Board must analyze the credibility and probative value of the evidence, account for the evidence that it finds to be persuasive or unpersuasive, and provide the reasons for its rejection of any material evidence favorable to the claimant. *Caluza v. Brown*, 7 Vet.App. 498, 506 (1995), *aff'd per curiam*, 78 F.3d 604 (Fed. Cir. 1996) (table); *Gabrielson v. Brown*, 7 Vet.App. 36, 39-40 (1994); *Gilbert*, 1 Vet.App. at 57.

Mr. Skotnik argues that he was entitled to a medical opinion because he informed the Board of the article that he had read, which he stated linked his COPD to herbicide exposure during service. He states that he is competent to report on facts that he read and that the Board erred by characterizing his statements as his own opinion. The Board noted that, in his October 2013 appeal, Mr. Skotnik stated that he read an article indicating that diseases caused by exposure to herbicides may not appear for more than a decade. However, the Board found that he did not cite to supporting medical opinions or treatise evidence and that his own opinion regarding the etiology of his COPD was not competent.

Mr. Skotnik does not argue that he submitted the relevant article to the Board or provided a citation or any identifying information about the article. Instead, he states only that he referred to the article. Mr. Skotnik is correct that a claimant is competent to report statements made by a physician. *See Jandreau v. Nicholson*, 492 F.3d 1372, 1377 (Fed. Cir. 2007). However, he has not cited any authority that requires the Board to accept as competent his report of a medical article that he has read. *See Hilkert v. West*, 12 Vet.App. 145, 151 (1999) (en banc) ("An appellant bears the burden of persuasion on appeals to this Court."), *aff'd per curiam*, 232 F.3d 908 (Fed. Cir. 2000) (table). Further, he does not provide any reasoning explaining why the holding in *Jandreau* is applicable to the facts in this case. *See Locklear v. Nicholson*, 20 Vet.App. 410, 416 (2006) (holding that the Court will not entertain underdeveloped arguments); *Coker v. Nicholson*, 19 Vet.App. 439, 442 (2006) ("The Court requires that an appellant plead with some particularity the allegation of error so that the Court is able to review and assess the validity of the appellant's arguments."), *rev'd on other grounds sub nom. Coker v. Peake*, 310 F. App'x 371 (Fed. Cir. 2008) (per curiam order).

Here, the Board considered the evidence of record, including Mr. Skotnik's statements. However, because he did not submit the article that he believed supported his claim, nor any information identifying that article, it was not in the record before the Board and the Board did not err in failing to consider it. *See* 38 U.S.C. § 7104(d)(1) (Board must provide its reasons and bases "on all material issues of fact and law presented on the record"). Accordingly, based on the record of proceedings before the Court, as well as the Board's discussion, the Court finds that the Board's determination that he was not entitled to a medical opinion was not "arbitrary,

capricious, an abuse of discretion, or otherwise not in accordance with the law." 38 U.S.C. § 7261(a)(3)(A); *see McLendon*, 20 Vet.App. at 81, 83.

Finally, the Court notes that, in his reply brief, Mr. Skotnik raises for the first time an argument that the Board erred by failing to request that he submit the article that he referenced in October 2013. However, the Court generally will not address arguments that are raised for the first time in a reply brief. *See Carbino v. West*, 168 F.3d 32, 34 (Fed. Cir. 1999) ("[I]mproper or late presentation of an issue or argument . . . ordinarily should not be considered."), *aff'g sub nom. Carbino v. Gober*, 10 Vet.App. 507, 511 (1997) (declining to review argument first raised in appellant's reply brief); *see also Tubianosa v. Derwinski*, 3 Vet.App. 181, 184 (1992) (appellant "should have developed and presented all of his arguments in his initial pleading"). Thus, the Court declines to consider this argument.

III. CONCLUSION

Upon consideration of the foregoing analysis, the record of proceedings before the Court, and the parties' pleadings, the November 24, 2015, Board decision is AFFIRMED.

DATED: November 30, 2016

Copies to:

Dana N. Weiner, Esq.

VA General Counsel (027)